BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.	Rulemaking 06-10-005

OPENING COMMENTS OF THE COUNTY OF LOS ANGELES, CALIFORNIA

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In response to the invitation and request of the Public Utilities Commission, the County of Los Angeles respectfully submits the following opening comments to certain provisions of the Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006 ("OIR"), and the Proposed General Order Implementing the Digital Infrastructure and Video Competition Act of 2006 ("Proposed General Order") attached as "Attachment B" to the OIR.

As a general comment, Section VI of the OIR sets forth an aggressive timeline for the Commission to reach a "final determination on the policies and procedures needed to implement this legislation." OIR, page 27. The stated rationale for this short timeline – the need to "implement this legislation consistent with its January 1, 2007 effective date" – is not supported by legislation itself. In apparent recognition of the comprehensive nature of AB 2987 and the complexity of the issues that will need to be resolved in implementing it, the Legislature set a date of April 1, 2007, for the Commission to begin accepting applications for state franchises. Pub. Util. C. § 5840(g). The County urges the Commission to utilize the extended time the Legislature authorized, rather than to rush through a rulemaking of this magnitude in order to reach the apparently self-imposed January 2, 2007 deadline to start accepting applications.

COMMENTS TO THE OIR

The County hereby comments on the following provisions of the OIR.

III. Preliminary Scoping Memo

A. Scope of Commission Authority Pertaining to Video Franchising

The OIR states:

> "Under AB 2987, local entities, not the Commission, have sole authority to regulate pursuant to many other statutory provisions, including . . .notably, federal and state customer service and protection standards (§ 5900)." OIR, page 6.

However, AB 2987 provides:

> The Division of Ratepayer Advocates shall have authority to advocate on behalf of video customers regarding renewal of a state-issued franchise and enforcement of Sections 5890, *5900*, and 5950. For this purpose, the division shall have access to any information in the possession of the commission subject to all applicable restrictions on disclosure of that information that are applicable to the commission. Pub. Util. C. 5900(k) (emphasis added).

Section 5900 addresses state and federal customer service and consumer protection standards and privacy standards.

Public Utilities Code Section 309.5 describes the role of the Division of Ratepayer Advocates ("DIR") as "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." Neither the OIR nor the Proposed General Order refer to the DIR or its role in Commission proceedings. However, the Legislature's granting of authority to the DIR for purposes of advocating, on behalf of video customers, on enforcement of customer service and protection standards appears to be in direct conflict with the Commission's conclusion that the Commission has no authority. Indeed, if the Commission has no enforcement authority, it is not clear exactly where the DIR will exercise its advocacy role. The Commission should clarify what the consumer protection and customer

service role of the DIR is in relation to the authority reserved to local entities in AB 2987, and whether the Commission does in fact have enforcement authority in this area.

B. General Order Establishing State Video Franchise Rules and Processes

2. Section III: When Applicants Can/Must Apply for a State Video Franchise

The OIR states:

> "[T]he Commission tentatively concludes that incumbent cable providers whose local franchises expire prior to January 2, 2008 shall have the option of renewing their local franchises or seeking a state franchise, and that *incumbent cable operators opting to seek a state franchise shall have their existing local franchises extended until January 2, 2008*." OIR, page 9 (emphasis added).

This tentative conclusion erroneously: (1) presumes that the Commission, rather than local entities, has authority under the legislation to extend such local franchises; (2) makes the extension of such local franchises both automatic and mandatory; and (3) implies that only incumbent cable operators who decide to seek a state franchise are subject to such an extension. The tentative conclusion is inconsistent with the language and intent of AB 2987 on all three counts.

Section 5930(b) of AB 2987 provides, in relevant part:

> "When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, *the local entity may* extend that franchise on the same terms and conditions through January 2, 2008." (emphasis added).

Thus, unlike the tentative conclusion of the OIR, the Legislature granted local entities, rather than the Commission, the authority to extend expired or expiring local franchises through January 2, 2008. Further, the Legislature utilized the permissive "may" rather than the mandatory "shall" in granting local entities such authority. The use of permissive language demonstrates that the Legislature intended to give local entities in this situation the *option* to

extend an expired or expiring franchise through January 2, 2008, rather than imposing an automatic and mandatory extension of expired or expiring local franchises across the state. Finally there is nothing in Section 5930(c), or anywhere else in the bill, which ties the authority of local entities to extend a local franchise that has expired, or will expire prior to January 2, 2008, to the intent of the affected incumbent cable operator to seek a state franchise. The PUC should not create such a limitation where none was intended by the Legislature.

Accordingly, the tentative conclusion should not be adopted by the Commission, and instead, should be amended in a manner which is consistent with the language of the legislation.

D. Calculation and Submission of User Fees

1. Policy and Procedures for Assessing User Fees

In discussing "user fees" to be paid to the Commission by state franchise holders to fund the Commission's budget for regulating state video franchises, the OIR states:

> "The Legislature stipulates that this fee shall be determined and imposes consistent with Section 542 of the federal Communications Act. Section 542 establishes the terms under which a cable operator may be required to pay a "franchise fee" as defined for the purposes of Section 542." OIR, page 20.

It is important that the Commission's rules acknowledge that the user fees paid to the Commission by state franchises are not a franchise fee within the meaning federal law, and in no way impact the obligation of state franchises to pay to local governments the full franchise fee imposed pursuant to Section 5860 of AB 2987.

The Federal Cable Act, defines franchise fee to include:

> "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." 47 U.S.C. 542(g)(1).

The Cable Act excludes certain taxes, fees, or assessments from the definition, however. Among these exclusions are:

> "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers)." 47 U.S.C. 542(g)(2)(A).

There can be no question that the Legislature's clear intent was that the user fee is a fee of general applicability – a fee imposed on both utilities and video service operators. The Legislative Counsel's Digest is supportive:

> "Existing law provides for the Pubic Utilities Commission Utilities Reimbursement Account. Existing law authorizes the commission to annually determine a fee to be paid by every public utility providing service directly to customers or subscribers and subject to the jurisdiction of the commission, except for a railroad commission." Legislative Counsel's Digest, AB 2987, ¶ 3.

The bill itself directs the PUC to establish the "Video Franchising Account" in the Commission's Utilities Reimbursement Account. Pub. Util. C. § 440(b). Thus, there should be no question that the user fee falls within the 47 U.S.C. Section 542(g)(2) exception to the Cable Act definition of "franchise fee." Although there does not appear to be anything in Proposed General Order that states otherwise, the language of the OIR raises the issue without expressly stating that the user fee is not a franchise fee within the meaning of the federal Cable Act and AB 2987. Thus, the County urges that the Commission clarify this point in the final General Order.

COMMENTS TO THE PROPOSED GENERAL ORDER

The County hereby comments on the following provisions of the Proposed General Order:

III. When Various Applicants Can/Must Apply for a State Video Franchise

A. The Commission's Role in Processing Applications

The Proposed Order states:

> "After January 1, 2008, the Commission shall be the sole franchising authority for new Video Service franchises in the State of California. Any person or

> corporation who seeks to provide Video Service in the state and does not already have a video franchise shall apply for a State Video Franchise with the Commission." Attachment B, Page 17.

This language is worded differently than in AB 2987, and the difference is substantial enough to create an ambiguity with respect to meaning of the legislation. Section 5840(c) provides that "[a]ny person who seeks to provide video service in this state *for which a franchise has not already been issued*, after January 1, 2008. (emphasis added). Thus, under the statutory language, a state franchise is *mandatory* only for persons who, as of January 1, 2008, have never obtained a franchise – a that term is defined in the bill – for the area that person seeks to serve. Conversely, the language used in the Proposed General Order ("does not *already have* a video franchise") creates a needless ambiguity regarding the situation where an incumbent cable operator (or any other person, for that matter) is, as of January 1, 2008, operating under a franchise that has expired and has not yet been renewed. The Legislature did not choose to make a state franchise mandatory in that situation. To the contrary, the Legislature gave the incumbent cable operator the *option* to apply for a state franchise (Section 5840(o)(1)), and gave the local entity the option to require the incumbent cable operator to obtain a state franchise (Section 5930(c)). Accordingly, the language in the proposed order should be amended to more accurately track the language of the legislation.

C. Applicants with Existing Franchises

2. Franchise Effective Date

The Proposed Order states:

> "Prior to January 2, 2008, an Incumbent Cable Operator with an expired or expiring franchise may choose to renew the local franchise or seek a State Video Franchise. If a State Video Franchise is sought, the local franchise shall be extended under its existing terms until the state franchise is effective." Attachment B, page 8.

This language conflicts with the language and intent of AB 2987 in several aspects. Specifically, the language: (1) presumes that the Commission, rather than local entities, has authority under the legislation to extend expired or expiring local franchises; (2) makes the extension of an expired or expiring local franchises "automatic" upon application for a state franchise by an incumbent cable operator; and (3) implies that only those incumbent cable operators who "seek" a state video franchise may have their franchises extended. There is nothing in the language of the Legislation which supports such rules.

As discussed earlier, Section 5930(b) of AB 2987 provides, in relevant part:

> "When an incumbent cable operator is providing service under an expired franchise or a franchise that expires before January 2, 2008, *the local entity may* extend that franchise on the same terms and conditions through January 2, 2008." (emphasis added).

There is nothing in the language which gives the Commission the authority to grant such extensions, or to make such extensions automatic and mandatory upon application for a state franchise by an incumbent cable operator with an expired or expiring local franchise. Instead, the Legislature clearly granted local entities the authority to extend such franchises. Further, the use of the permissive "may" rather than the mandatory "shall" clearly demonstrates the Legislature's intent to grant local entities the discretion to extend or not to extend such franchises. Finally there is nothing in Section 5930(c), or anywhere else in the bill, that limits the authority of local entities to extend an expired or expiring local franchise to situations where the incumbent cable operator seeks a state franchise. The language of AB 2987 grants the local entity the option to extend an expired or expiring local franchise regardless of whether the incumbent cable operator applies for a state franchise or not. This section of the Proposed General Order should be amended in a manner that is consistent with the language of AB 2987.

VI. The State Video Franchise – Authorization to Offer Service, Obligations, Amendment, Renewal, Transfer, Voluntary Termination, and Miscellaneous Charges

D. Renewal of A State Video Franchise

3. Commission Review and Issuance of a State Video Franchise Renewal.

The Proposed General Order states:

> "The Commission shall not renew any State Video Franchise that is inconsistent with federal law and regulations." Attachment B, page 20.

It is unclear exactly what the Commission means by this language. However, it does not appear that the language is consistent with the intent of the Legislature.

With regard to the relationship between renewal of a state franchise and federal law, AB 2987 provides that "[r]enewal of a state franchise shall be consistent with federal law and regulations." Cal. Pub. Util. C. §5850(c). Under federal law, cable franchise renewals are governed by the renewal provisions of the federal Cable Act, codified at 47 U.S.C. Section 546. The Cable Act provides two separate procedures by which a renewal can be granted. 47 U.S.C. Section 546(a) through (g) sets forth a set of detailed procedures for an administrative renewal process generally known as the "formal renewal process." A key component of this process in the opportunity for the public to participate in the renew process. *See*, 47 U.S.C. § 546(a)(1)(the local franchising authority shall "commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term.").

47 U.S.C. Section 546(h) provides an alternative means of franchise renewal. Under this provision – commonly knows as the "informal process" – the local franchising authority and the

cable operator generally reach a negotiated agreement on the terms and conditions of a franchise renewal. However even under the informal process, the public must be afforded "adequate notice and opportunity to comment" on the renewal. 47 U.S.C. § 546(h).

There is nothing in the Proposed General Order which establishes procedures that provide the public an opportunity to participate in the renewal process. The Proposed General Order provides that renewal applications "shall be submitted and evaluated by the Commission according to the same criteria and processes applicable to initial State Video Franchise Applications. In the OIR, the Commission states a tentative conclusion that "no person or entity may file a protest to a state video franchise application." OIR, page 11. This conclusion is incorporated in Section IV.C of the Proposed General Order. Attachment B, page 14. Thus, in fact, rather than providing the public an opportunity to meaningfully participate in the renewal process, the Commission appears to be expressly excluding the public from any participation.

Any state franchise renewal process which does not, at a minimum, afford the public with adequate opportunity for participation and comment, will not be "consistent with federal law and regulation" and therefore, will not be consistent with the language or intent of AB 2987. Accordingly, the renewal provisions should be amended to, at a minimum, provide an opportunity for meaningful public participation in the process.

CONCLUSION

The County remains concerned that the Commission has not set aside sufficient time for this rulemaking, and believes that the issues raised in these comments demonstrate the complexity of implementing such comprehensive legislation. Accordingly, the County urges the Commission to set a more realistic timeline which allows the Commission and all parties

involved sufficient time to ensure that the Commissions delegated role in administering the new state franchising scheme is accurately and fairly reflected in the final General Order.

The County appreciates the opportunity to participate in this important rulemaking process, and anticipates submitting additional comments where appropriate at each stage.

Respectfully submitted,

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October 25, 2006

CERTIFICATE OF SERVICE

I certify that I have served a true copy of the original attached OPENING COMMENTS OF THE COUNTY OF LOS ANGELES, CALIFORNIA on all known parties of record in this proceeding or their attorneys of record.

Dated: October 25, 2006 at Washington, DC

/S/
Willette A. Hill

CALIFORNIA PUBLIC UTILITIES COMMISSION
Service Lists

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